SUPREME COURT, U. S.

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No. 241

In the Supreme Court of the United States

OCTOBER TERM, 1968

PAUL CHING-SZU CHEN, PETITIONER

v.

R. WILLIAM FOLEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 385 F. 2d 929.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1967. A petition for rehearing was denied on January 31, 1968. Mr. Justice Stewart ex-

tended the time for filing a petition for a writ of certiorari to June 29, 1968, and on June 27, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, provides in pertinent part:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
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> * * * *

QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying the petitioner's application for adjustment of status from non-immigrant to immigrant.

STATEMENT

Unlike the legal issue tendered, the facts in this case are somewhat complex. Petitioner is a native

and citizen of China (R. 178, 173, 172, 166).[1] He is married and the father of eight children. His wife and seven of his children reside in the Philippine Islands and a daughter lives in China (R. 170, S. R. 48).

On December 10, 1960, Paine College in Augusta, Georgia, on the basis of petitioner's membership in a profession, requested the Immigration and Naturalization Service to grant him a visa according him first preference status under the quota for Chinese persons (R. 157). The service approved the petition and forwarded it to the United States Embassy at Manila where petitioner then resided (R. 157). Petitioner did not obtain an immigrant visa, however, possibly because a first preference visa was not then available under the quota for Chinese persons.

Instead, he applied for and received a non-immigrant visitor's visa, allegedly so that he could sightsee in Hawaii for three weeks (R. 174). Petitioner actually entered the United States, on May 24, 1961, at Seattle, Washington, as a non-immigrant eligible to remain only until November 23, 1961 (R. 170). A few months after arriving in this country as a visitor, petitioner accepted a teaching position at Paine College without obtaining the required authorization from the Service (R. 170). Shortly before the expira-

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[1] References are to the initial certified administrative record ("R."), the supplemental certified administrative record of the reopened deportation proceedings ("S.R.") and to appellant's appendix ("App.") filed in the court of appeals. The record and supplemental record of the administrative proceedings have been filed by the petitioner. We are lodging a copy of petitioner's appendix in the court of appeals together with this brief.

tion date of his authorized stay as a visitor, petitioner was notified by the Service that his employment would prohibit the Service from extending his stay as a nonimmigrant, but that Paine College could file another first preference petition if it so desired. The letter also informed petitioner that his authorized stay would be extended until January 26, 1962, the expiration date of the original petition filed on his behalf by Paine College (R. 112). On November 10, 1961, Paine College requested revalidation of its petition for a first preference visa for petitioner (R. 156).

On January 1, 1962, while the college's request for revalidation of petitioner's visa was still pending, petitioner married Ella Lucille Self, a native-born United States citizen (R. 182). She then filed with the Service a visa petition seeking nonquota immigrant status for her new husband. The visa petition was supported by letters addressed to petitioner from relatives and friends in Hong Kong and China reporting that his first wife had died suddenly in China while on a trip to visit her sick mother (R. 183-190).

In anticipation of approval of his wife's visa petition, petitioner filed an application to adjust his status to that of a permanent resident (R. 170-171a). However, petitioner's wife withdrew her visa petition and the visa petition filed by Paine College expired without being revalidated. The District Director therefore denied the application for adjustment of status (R. 166).

Following that denial the Service notified petitioner that his authorized stay would expire on

March 15, 1963.[2] When he failed to depart, the Service commenced deportation proceedings against him, charging that, after entry as a visitor, he had remained longer than permitted (R. 166).

Deportation hearings began on April 1, 1963, and concluded a year later. During the early stages of the hearing petitioner filed another application for adjustment of status based upon a 1962 amendment to the Immigration and Nationality Act (R. 48). By virtue of that amendment, certain aliens were accorded nonquota status if they were on April 1, 1962, the beneficiaries of approved visa petitions, and if they were, at the time of application for adjustment of status, found to have retained their status as established in their approved petitions. Public Law 87-885, Section 2, 76 Stat. 1247.

On May 26, 1964, the special inquiry officer held petitioner to be deportable as charged. He denied petitioner's application for adjustment of status under Section 245 of the Act on the ground that petitioner failed to meet the statutory requirement of having an immigrant visa immediately available to him. He found that, since petitioner had left his employment with Paine College in June 1962, he had not maintained his first preference status and, therefore, was not eligible for the benefits of the 1962 amendment.

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[2] On January 23, 1963, Ella Self reinstated her visa petition on behalf of petitioner (R. 118-119). Through an investigation in the Philippines, the Service discovered that petitioner's first wife was in fact still alive, and Ella Self's petition was accordingly denied (R. 151). She subsequently obtained an annulment of her marriage to petitioner (S. R. 85-86).

The officer authorized petitioner to depart voluntarily in lieu of deportation (R. 44-54).

Both petitioner and the Service filed appeals (R. 28, 36), and on August 21, 1964, the Board of Immigration Appeals affirmed the finding of deportability and the denial of an adjustment of status under Section 245 of the Act. The Board denied petitioner the privilege of voluntary departure on the ground that he lacked good moral character since he knew he was contracting a bigamous marriage with Ella Self (R. 14-20).

Petitioner, nevertheless, entered into a contract with Rust College, Holly Springs, Mississippi, to teach there through June 1, 1965 (App. 44a-45a). On September 12, 1964, Rust College filed a first preference visa petition on behalf of petitioner (App. 45a-47a). No action was taken on this petition at that time. On June 8, 1965, petitioner was served with a notice to surrender himself within three days, for deportation to Formosa (R. 10).

On June 10, 1965, petitioner sought review of the Board's action by a petition for a writ of habeas corpus in the United States District Court for the Western District of Tennessee. On August 13, 1965, the district court affirmed the Board's denial of adjustment of status but reinstated the special inquiry officer's allowance of voluntary departure. The court determined that the evidence did not prove conscious fraud with respect to petitioner's "marriage" to Ella Self (App. 7a-9a). On September 30, 1965, the first preference petition filed a year earlier by Rust College was denied (S.R. 65-67). Meanwhile, petitioner

appealed the district court's decision to the court of appeals (App. 2a).

While petitioner's appeal was pending, the Act of October 3, 1965, 79 Stat. 911, became effective. This Act amended Section 203 of the Immigration and Nationality Act, making it easier for a professional to qualify for approval of a visa petition. In particular, the requirement that the prospective immigrant's services must be substantially beneficial to the national economy, cultural interests, or welfare of the United States was eliminated for professionals, and professionals automatically qualified for immigrant visas to the extent of their availability within the third preference group.

Rust College, seeking to take advantage of the changes made by the amendment, initiated a third preference visa petition on behalf of petitioner. The petition was granted (S.R. 42, 88). Petitioner then filed a motion with the Board of Immigration Appeals seeking to reopen the deportation proceedings and his motion was granted on April 28, 1966 (S.R. 90, 87). On June 27, 1966, the court of appeals ordered that the appeal be held in abeyance until the completion of the administrative proceedings.

On October 10, 1966, the special inquiry officer again ordered petitioner's deportation and denied his applications for adjustment of status and voluntary departure. These denials, however, were based upon discretionary grounds, rather than on the unavailability of a visa or the lack of good moral character (S.R. 44-54).

Petitioner again appealed to the Board. On February 24, 1967, the Board affirmed the special inquiry officer's decision but granted voluntary departure in lieu of deportation. The board based its decision on two grounds: (1) that while it is the function of the immigration laws to keep the family unit together, petitioner's family was living in the Philippines and was unlikely to be brought here; and (2) that there was doubt as to whether petitioner had entered the country as a bona fide non-immigrant. On this latter ground, the Board noted the consistent decisions that a preconceived intent to establish permanent residence via the non-immigrant route is a factor to be considered in ruling on an application for adjustment of status under Section 245 of the Immigration and Nationality Act (S.R. 14-22, Pet. App. 34-41).

Since the Board's order terminated the reopened administrative proceedings, the court of appeals treated the appeal as an original petition to review a final order of deportation under the Act. The court found that the Board had not abused its discretion in denying an adjustment of status and affirmed its decision. The instant petition followed.[3]

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[3] On August 23, 1967, the Service approved a third preference petition filed on petitioner's behalf by Knoxville College where petitioner is currently employed as chairman of the department of psychology (Pet. App. 42-43). On June 24, 1968, petitioner, pro se, filed a motion with the Board of Immigration Appeals to reconsider its refusal to grant an adjustment of status under Section 245; the Board has not yet acted on that motion.

ARGUMENT

After a thorough examination of the facts contained in the record of the protracted administrative proceedings in this case, the court below concluded that the Board of Immigration Appeals had not abused its discretion in denying petitioner an adjustment of status under Section 245 of the Act. That conclusion is amply supported by the facts of record and no further review is warranted.

Section 245 of the Act contains two elements. The first enumerates the objective requirements which an alien must meet in order to be eligible for adjustment of status; the second calls for the exercise of discretion by the Attorney General. When, as is true in this case, adjustment of status is denied as a matter of discretion, the role of the reviewing court is limited to an examination of the record to ascertain whether that discretion has been abused. The courts, of course, may not substitute their judgment for that of the administrative agency *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 228-229; *Cubillos-Gonzalez* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9). Since the grant of adjustment of status to one alien lessens the opportunity for entrance by some other alien abroad who is following the normal channels for immigration, and reduces the possibility of adjustment of the status of some other applicant in this country, it is proper that administrative discretion in this area should be exercised carefully. See *Santos* v. *Immigration and Naturalization Service*, 375 F. 2d 262 (C.A. 9).

The Board was justified in concluding that the adverse factors in petitioner's case outweigh those in his favor, including the benefit of his service to inadequately staffed Negro colleges.

When petitioner came to this country he left a wife and seven children behind in the Philippines. He has not made any meaningful contribution to their support since that time. He quickly contracted an unconsummated second marriage without adequately investigating the reports of his first wife's alleged death. Petitioner argues that his relationship to his family should not be considered against him because the family may not desire to be united. He also suggests that if his application for adjustment of status is granted he might be able to bring his family here. Given petitioners' past history, however, the Board had ample basis for finding that petitioner's relationship to his family showed unworthiness for the relief of adjustment of status, and that allowing such adjustment would contravene one of the purposes of the immigration laws, namely, keeping a family together. Similarly, the Board acted properly in taking into account the likelihood of bad faith when petitioner entered this country as a non-immigrant. Such circumstances have consistently played a role in the exercise of discretion under Section 245. See *e.g.*, *Cubillos-Gonzales* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9). It is evident, therefore, that the Board's action in this case cannot be said to be arbitrary or capricious.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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